as at the dates of the presentation and hearing of the petition." (Page 78H)

Applying these statements to the present case, the current base lending rate of "10.25%" and the taxed costs of "$9,880.50" in the creditor's petition cannot be read into the bankruptcy notice. Thus, on the date of issue of bankruptcy notice, it could not be said of the judgment on the interest and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been quantified into a liquidated sum. It cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded, did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy, and that being the case the bankruptcy notice was a nullity *ab initio*, and the debtor is entitled to succeed.

For the above reasons we allow the appeal with costs and set aside the adjudication and receiving orders. We also order the deposit to be refunded to the appellant.

Appeal allowed.

Solicitors *S.I. Rajah & Partners; L.M. Ong & Co.*

PHANG YONG FOOK v. PUBLIC PROSECUTOR

[A.Cr.J. (Zakaria Yatim J.) September 30, 1987]

[Kuala Lumpur – Criminal Appeal No. CR 52-24 of 1987]

Criminal Procedure – Bail – Charge of criminal breach of trust – Accused released on bail pending trial – Application for bail to be revoked – Allegation that accused had been harassing and tampering with witnesses – No evidence adduced – Bail revoked – Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389.

In this case, the applicant had been charged in the Sessions Court with abetting the offence of criminal breach of trust and also for committing the offence itself. He was released on bail in the sum of $1 million in four sureties pending his trial. At the commencement of the trial, the prosecution sought for an order to revoke the bail. It was alleged that the applicant had been harassing and tampering with witnesses. After hearing the learned Deputy Public Prosecutor and counsel for the applicant, the learned Sessions Judge made an order revoking the applicant's bail. The applicant applied to the High Court for an order that he be admitted to bail.

Held: (1) the considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases, when by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses;

(2) even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first;

(3) in this case, the learned Deputy Public Prosecutor only made vague allegations of harassment, tampering with witnesses and intimidation in support of his application to revoke the bail in the court below. There was no oral or documentary evidence or even an affidavit to support the allegations;

(4) the revocation order must therefore be set aside and the applicant be released on bail on the terms of the bail bond executed by him and his sureties.

Cases referred to:

(1) *Public Prosecutor* v. *Wee Swee Siang* [1948] M.L.J. 114.

(2) *Sant Ram & Ors.* v. *State* [1952] Cr.L.J. 1223; A.I.R. 1958 Jammur Kashmir 28.

(3) *Maibam Bidhu Singh & Ors.* v. *Manipur Administration* [1959] Cr. L.J. 1453; A.I.R. 1959 Manipur 47.

(4) *Madhukar Purshothan Mondkar & Anor.* v. *Talab Haji Hussain & Ors.* A.I.R. 1958 Bombay 406.

(5) *R.K. Nabenchandra Singh* v. *Manipur Administration* [1964] 2 Cr.L.J. 307; A.I.R. 1964 Manipur 307.

(6) *The State* v. *Sanjay Gandhi* A.I.R. 1978 S.C. 961.

CRIMINAL APPLICATION.

Low Hop Bing (*Tong Teck Yong* with him) for the appellant.

P.L. Tan (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the accused in Kuala Lumpur Sessions Court Arrest Case Nos. 69/87 and 70/87 for an order that he be admitted to bail under section 389 of the Criminal Procedure Code.

On May 4, 1987 the applicant was charged in the Sessions Court for abetting the commission of an offence of criminal breach of trust in A/C No. 69/87 and for committing criminal breach of trust in A/C No. 70/87. On the same day, the learned Sessions judge allowed him to be released on a bail of $1 million in four sureties. The bail was duly executed and the applicant was released pending his trial, which was fixed on September 21, 1987.

At the commencement of the trial, the learned Deputy Public Prosecutor applied to the Sessions Court for an order that the bail granted to the applicant be revoked. The learned Deputy told the Sessions Court that he had been informed that the applicant "has been harassing and tampering with the witness". He further told the court that it was "already difficult to get witnesses to come to court. It is worse if these witnesses are tampered with and harassed ..." The learned Deputy, however, was not prepared to reveal the witnesses in question on the ground that "there would be further intimidation." Mr. Tong and Mr. Low Hop Bing, who were counsel for the applicant in the court below, objected to the application.

After hearing the arguments of both the learned Deputy and counsel for the applicant, the learned Sessions judge made an order revoking the applicant's bail and the applicant was accordingly committed to custody.

The question for the court to consider is whether the order revoking the applicant's bail was a valid order.

It is not in dispute that the learned Sessions judge has the power to commit a person, who has been released on bail in respect of a non-bailable offence, to custody. Section 388(v) of the Criminal Procedure Code states:

"Any court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody."

The Criminal Procedure Code does not lay down the procedure to be adopted by the court in exercising its discretion under section 388(v). The learned Deputy, in support of his application in the court below, relied on *Public Prosecutor* v. *Wee Swee Siang.*[1] But that case only provided the factors to be taken into consideration when the court was granting or refusing bail. That case was not concerned with the revocation of bail.

There seems to be no decided case in this country on the question of revocation of bail under section 388(v). In the absence of local authority, it is perhaps useful to examine the Indian decisions on this point. The present Indian equivalent of section 388(v) is section 437(5) of the Indian Code of Criminal Procedure 1973. Section 437(5) corresponds to section 497(5) of the old Indian Code of 1898. Section 437(5) of the 1973 Indian Code reads:

"Any court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do direct that such person be arrested and commit him to custody."

The Indian cases cited by the learned Deputy and learned counsel were cases decided under the old Indian Code as well as under the 1973 Code. The decisions of the Indian courts were, however, not consistent.

In *Sant Ram & Others* v. *State,*[2] the High Court of Jammu and Kashmir decided that affidavit evidence was not acceptable to support an application for cancellation of bail under section 497 of the 1898 Code. The court held that the witnesses who had been intimidated by the accused person should testify in court and they should be subject to cross-examination.

In *Maibam Bidhu Singh & Others* v. *Manipur Administration,*[3] the High Court of Manipur held that it was not essential that positive evidence of witnesses showing that the accused persons were tampering with the prosecution witnesses must be tendered and the fact proved beyond all doubt before the court could act under section 497(5) of the old Code. In that case, the Sessions judge, after examining one prosecution witness who had turned hostile, cancelled the bail on the ground that the accused were likely to tamper with the evidence. J.N. Dattan J.C. in his judgment said:

"... and the learned Sessions judge was satisfied that there were grounds to believe that the petitioners would tamper with the evidence, if released on bail, and for that he had material in the shape of evidence of a witness, who did not support the prosecution case before the committing magistrate, yet admitted that the accused persons were influential persons, and villagers were afraid to give evidence against them."

The High Court of Bombay in *Madhukar Purshothan Monkar & Another* v. *Talab Haji Hussein and Others,*[4] decided that affidavit evidence was sufficient to support an application for the cancellation of bail.

Although the Indian decisions cited above are not consistent, one thing is clear: all the cases agree that the bail of an accused person cannot be cancelled unless there is some form of evidence in support of the application for the cancellation.

The Indian Court has decided that mere vague allegations would not be sufficient for the purpose of cancelling a bail. In *R.K. Nabanchandra Singh*

v. *Manipur Administration,*[5] Tirumalpad J.C., in his judgment at p. 313, said:

"When next we come to the petition filed before the Sessions judge, we find that further reasons are mentioned for cancelling the bail. They are that the petitioner was involved in a cheating case previously, that he is a man of desperate character, that he was likely to kidnap the girl with the help of other associates of similar desperate character and further that the accused was found to have contacted some of the important witnesses since he was enlarged on bail. No details are mentioned as to the important witnesses the petitioner was said to have contacted. *Such vague allegations are not sufficient to cancel the bail.* The fact that the petitioner was involved in a cheating case previously is again no reason why bail should be refused in the present case. As I pointed out, the police have been going on adding more and more reasons in their desperate attempt to see that the petitioner was deprived of his liberty."

[Emphasis added].

In the present case, the learned Deputy only made vague allegations of harassment, tampering and intimidation in support of his application to revoke the bail in the court below. There was no oral or documentary evidences or even an affidavit to support the allegations.

The *Wee Swee Siang* case cited by the learned Deputy in the court below does not apply in this case. That case was concerned with the granting or refusal of bail.

The considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. See *Sohoni's Code of Criminal Procedure,* 18th edn. p. 4568. See also *The State* v. *Sanjay Gandhi.*[6]

Even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first. *Sohoni's Code of Criminal Procedure* 18th edn. p. 4569.

For the reasons stated above, I set aside the revocation order made by the learned Sessions judge and order that the applicant be released forthwith on the terms of the bail bond executed by him and his sureties.

Order accordingly.

Solicitors: *Low Hop Bing & Associates.*

FIMA PALMBULK SERVICES SDN. BHD. v. SURUHANJAYA PELABUHAN PULAU PINANG & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) July 13 & September 14, 1987]

[Penang – Originating Summons No. 346 of 1985]

Arbitration – Dispute as to appointment of arbitrator – Covenant relating to appointment of arbitrator – Subleases are assignments.

Land Law – Subleases – Subleases are assignments – Same interest transferred.

The first defendant is the registered proprietor of land within the Butterworth Port and by two leases, the first defendant leased to Kumpulan Fima Berhad the property known as Butterworth Deepwater Wharves for the purpose, *inter alia,* of erecting and thereafter repairing and maintaining a project.

By two subleases, Kumpulan Fima Berhad subleased the said property to the plaintiffs for the purpose of implementing the said project.

Thereafter, a dispute arose between the plaintiffs and the first defendant. The first defendant appointed the second defendant as an arbitrator, as the leases and subleases provided that disputes should be settled through arbitration. The first defendant asked the plaintiffs to appoint their arbitrator in accordance with the agreement. The plaintiffs, however, did not appoint any arbitrator. They contended that there was no privity of contract between the first defendant and the plaintiff and therefore there was no arbitration agreement between them.

The plaintiffs applied to set aside the purported appointment of the second defendant to act as an arbitrator.

Held: (1) as it had been established that there was no privity of contract between the first defendant and the plaintiffs, the first defendant cannot enforce the covenant of the sublease relating to the appointment of arbitrators;

(2) however, the subleases were actually assignments given by Kumpulan Fima Berhad to the plaintiffs;

(3) the plaintiffs' application was dismissed with costs.

Cases referred to:

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1968] 1 M.L.J. 170 P.C.
(2) *Yong Nyee Fan & Sons Sdn. Bhd.* v. *Kim Guan & Co. Sdn. Bhd.* [1979] 1 M.L.J. 182, 190.
(3) *Goh Gin Chye & Anor.* v. *Peck Teck Kian Realty Pte. Ltd. & Anor.* [1987] 2 M.L.J. 118.
(4) *Milmo* v. *Carreras* [1946] 1 K.B. 306.

ORIGINATING SUMMONS.

S.E. Rajah for the plaintiff.
Lim Peng Siew for the first defendant.
Manjit Singh for the second defendant.

Cur. Adv. Vult.